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IN THE

Supreme Court of the United States

October Term, 1963

IN THE MATTER OF THE UNAUTHORIZED PRACTICE OF LAW IN RE J. HARVEY CROW,
Appellant.

MOTION TO DISMISS APPEAL AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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William B. Saxbe, Attorney General of Ohio, as attorney for the Supreme Court of Ohio and in opposition to appellant's petition for writ of certiorari herein and in support of his motion to dismiss the appeal herein, respectfully states the following:

I.

STATEMENT OF THE CASE

The action herein was initiated by an application filed October 1, 1958 by the Unauthorized Practice of Law Committee of the Ohio State Bar Association for an order of the Supreme Court of Ohio that the appellant, J. Harvey Crow, was in contempt of court for engaging in the unauthorized practice of law. On October 21, 1959, the appellant was found guilty of contempt by the Supreme Court of Ohio

and sentence therefor was suspended conditioned upon his discontinuance of the practice of law.

On May 3, 1963, a second application was filed by the Unauthorized Practice of Law Committee of the Ohio State Bar Association for an order finding the appellant in contempt of the Supreme Court of Ohio for engaging in the practice of law and an order finding the appellant in violation of the October 21, 1959 order of the court.

On May 6, 1963, appellant was personally served with an order to show cause by May 13, 1963 why he should not be found in contempt of the former (October 21, 1959) order of the court for filing a notice of appeal to the Supreme Court of Ohio and for filing assignments of error and a brief in Case No. 298, Court of Appeals for Union County, Ohio (*Eidmiller* v. *Kerns*) and why the suspension of imposition of sentence against him should not be raised. On May 13, 1963 appellant filed a motion to make the application of the committee of the Ohio Bar association more definite and certain and for an extension of time until June 15, 1963, for filling an answer to the application. On May 22, 1963 a citation was issued granting the extension to file answer to the application until June 15, 1963 as to all parts of the application except specification "A" relating to the appellant's activities in Case No. 298, Court of Appeals for Union County, Ohio, and appellant was ordered to show cause by May 29, 1963 why his activities in the Union County case, should not be found in contempt of court and the suspension of imposition of the former order of the court raised, and was ordered to appear for a hearing on May 29, 1963 before the court. The citation was served upon appellant by resident service on May 27, 1963. Appellant failed to answer the show cause order and failed to appear for hearing on May 29, 1963 and failed to answer the application for contempt by June 15, 1963.

Appellant was taken into custody on November 13, 1963 by the sheriff of Champaign County, Ohio, pursuant to process of the Supreme Court of Ohio and was given a hearing by the Supreme Court of Ohio on November 19, 1963. After hearing, the appellant was found guilty of contempt of court for failing to appear at the hearing of May 29, 1963 and for practicing law in the Case of *Eidmiller* v. *Kerns*, No. 298, Court of Appeals of Union County, Ohio, as appears in the record of that case filed in the Supreme Court of Ohio, and the suspension of the imposition of sentence upon appellant ordered by the court on October 21, 1959 was raised and appellant was fined $500.00 and sentenced to ten days in jail on each count.

On January 22, 1964 the Supreme Court of Ohio overruled a motion by appellant for an order vacating the judgment of November 19, 1963 and for rehearing.

Appellant here seeks to appeal from the judgment of the Supreme Court of Ohio rendered November 19, 1963 and in the alternative for a writ of certiorari to review the judgment.

II.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

28 U.S.C.A. Section 1257:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn

in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Appellant has not drawn in question the validity of any statute of the state of Ohio as being repugnant to the Constitution, treaties or laws of the United States within the meaning of Section 1257, above. The appeal then must be considered as a petition for a writ of certiorari.

III.

STATUTES OF OHIO

Section 2705.01, Revised Code:

A court, or judge at chambers, may summarily punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice.

Section 2705.02, Revised Code:

A person guilty of any of the following acts may be punished as for a contempt:

(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer.

(B) Misbehavior of an officer of the court in the performance of his official duties, or in his official transactions;

(C) A failure to obey a subpoena duly served, or a refusal to be sworn or to answer as a witness, when lawfully required;

(D) The rescue, or attempted rescue, of a person or of property in the custody of an officer by virtue of an order or process of court held by him;

(E) A failure upon the part of a person recognized to appear as a witness in a court to appear in compliance with the terms of his recognizance.

Section 2705.03, Revised Code:

> In cases under section 2705.02 of the Revised Code, a charge in writing shall be filed with the clerk of the court, an entry thereof made upon the journal, and an opportunity given to the accused to be heard, by himself or counsel. This section does not prevent the court from issuing process to bring the accused into court, or from holding him in custody, pending such proceedings.

Section 2705.05, Revised Code:

> Upon the day fixed for the trial in a contempt proceeding the court shall investigate the charge, and hear any answer or testimony which the accused makes or offers.
>
> The court shall then determine whether the accused is guilty of the contempt charge. If it is found that he is guilty, he may be fined not more than five hundred dollars or imprisoned not more than ten days, or both.

IV.

QUESTION PRESENTED

The question presented is whether the petition for writ of certiorari herein raises a substantial federal question.

V.

THE JUDGMENT OF THE SUPREME COURT OF OHIO IS NOT IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

It should be noted at the outset that Section 2705.01, Revised Code of Ohio, is a codification of the common law definition of a direct contempt. *In re Lands*, 146 Ohio St. 589, 67 N.E. (2) 433 (1946); *Seidenfeld* v. *Seidenfeld*, 28 Ohio L. Rep. 401 (1929). Section 2705.05, Revised Code of Ohio, has no application to a proceeding under Section 2705.01, Revised Code of Ohio, but refers to proceedings

under Section 2705.02, Revised Code of Ohio. *Myers* v. *State*, 46 Ohio St., 472, 22 N.E. 43 (1889).

The judgment of the Supreme Court of Ohio is in three branches as follows:

> 1. Appellant is guilty of contempt for failure to comply with the orders of the court on May 16, 1963 and May 22, 1963 ordering him to show cause why he should not be found in contempt for violating the court order of October 21, 1959 and ordering him to appear on May 29, 1963 to answer the show cause order, respectively.
>
> 2. Appellant is in contempt for practicing law as appears from the record filed in the Supreme Court of Ohio in the case of *Eidmiller* v. *Kerns*, No. 298, Court of Appeals, Union County, Ohio.
>
> 3. The suspension of imposition of sentence for contempt of the Supreme Court of Ohio rendered on October 21, 1959.

Petitioner seeks a review of this action of the Supreme Court of Ohio on writ of certiorari claiming the action violated the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

The Fifth Amendment appears to be totally irrelevant to this case and will not be discussed.

With regard to petitioner's contention that the proceeding before and judgment of the court below contravened the Sixth Amendment, it has been held by the Supreme Court of the United States that procedural safeguards for criminal contempt proceedings do not derive from the Sixth Amendment and that there is no Sixth Amendment right to a public trial in such proceedings. *Levine* v. *United States*, 362 U.S. 610, 4 L ed (2) 989, 80 S.Ct. 1038 (1969). By a parity of reasoning, there is likewise no Sixth Amendment right in a criminal contempt proceeding to the assistance of counsel for defence. The Sixth Amendment, then, as it relates to the states through the operation of the

Fourteenth Amendment does not support the contentions of petitioner.

The only question there can be is whether the action of the court offended "due process" concepts of notice and hearing.[1] And clearly the answer is that the conduct of this proceeding was not in violation of the Fourteenth Amendment.

As the record in this case shows, petitioner was personally served on May 6, 1963 with an order to show cause why he should not be found in contempt of the October 21, 1959 order of the court, for filing a notice of appeal to the Supreme Court of Ohio and for filing an assignment of errors and a brief in the case of *Eidmiller* v. *Kerns*, No. 298, Court of Appeals, Union County, Ohio, and why the suspension of imposition of sentence against him should not be raised. The record also shows that petitioner was served with a citation by resident service on May 27, 1963 to appear on May 29, 1963 to answer the show cause order. Petitioner neither answered the show cause order nor appeared at the hearing on May 29, 1963. At the hearing on May 29, 1963, evidence was introduced to show that petitioner had knowledge of the hearing (May 29, 1963, Transcript p. 6) and evidence was introduced to show that the record of the case of *Eidmiller* v. *Kerns*, No. 298, Court of Appeals, Union County, Ohio, in which the petitioner filed an assignment of errors and brief was, pursuant to a notice of appeal by

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[1] Refusing to respond to a show cause order and failing to appear in response to a citation and filing an appeal to the Supreme Court of Ohio in violation of a previous order of the Supreme Court of Ohio appear to be direct contempts of that court for they were taken in the presence of the court and no extrinsic evidence was needed to show such actions. However, because there was notice and a hearing under Section 2705.03, Revised Code of Ohio, the question appears academic. The third branch of the order of the Supreme Court of Ohio merely lifted the suspension of imposition of sentence for a prior contempt.

petitioner, filed in the Supreme Court of Ohio and is an official file of the Supreme Court of Ohio[2] (May 29, 1963 Transcript pp. 3, 4).

The proceeding on May 29, 1963 was conducted at the regular public session of the Supreme Court of Ohio for that date. A second hearing at the regular public session was accorded petitioner on November 19, 1963 at which petitioner failed to give adequate reason for his failure to appear at the May 29, 1963 hearing, and failed to show cause why he should not be found in contempt for the unauthorized practice of law (November 19, 1963, Transcript pp. 10, 13).

The adequacy of notice and the fairness of the hearing in this contempt proceeding are amply demonstrated by the record. But questions of adequacy of notice and hearing aside, it is manifest that petitioner failed to make timely objection to the procedures he now assails and it follows that such procedures were not, as to petitioner, contrary to the Due-Process Clause. *Levine* v. *United States*, 362 U.S. 610, 619, 4 L.ed. 989, 80 S.Ct. 1038 (1960).

Specifically, petitioner having knowledge of the hearing on May 29, 1963, on the show cause order served upon him on May 6, 1963, failed to appear for the hearing or to seek a continuance, and failed to ask the court to appoint counsel (until the day before his second hearing on November 19, 1963) and generally avoided (November 19, 1963, Transcript p. 12) all process of the court from May 27, 1963 until he was taken into custody by a sheriff on November 13, 1963.

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[2] The record in this case was sent to the Supreme Court by the Court of Appeals in response to the notice of appeal filed by petitioner. It was not necessary to introduce the record into evidence, therefore, to bring it before the Supreme Court of Ohio but it was done for the purpose of making a complete transcript. The appeal was never perfected by the petitioner.

In summary, the record and the evidence fail to show that the proceeding and judgment herein are in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and the petition is not well taken.

VI.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED

There is no substantial federal question raised by this petition for certiorari within the meaning of Rule 19 (1) (a) of the Supreme Court Rules, and there are no special and important reasons for granting the writ.

The decision of the Supreme Court of Ohio decided no federal question either expressly or by the reach of its judgment. The dimensions of the judgment in this case are confined to the authority of the highest court of a state to control the practice of law in the state and the action of the court in this case was necessary to punish conduct tending "directly to prevent the discharge of * * (its) functions." *Wood v. Georgia*, 370 U.S., 375, 8 L ed. (2) 569, 82 S.Ct. 1364 (1962).

The claim that constitutional rights were infringed by the proceeding in contempt in the state court is raised here for the first time. This is shown by the motion to vacate the judgment of the Supreme Court of Ohio the substance of which is that petitioner was not guilty of contempt and that a special master should be appointed to hear evidence.

Petitioner does not, by his petition, raise the question of the operation or application of a state statute or raise a question as to the effect of established judicial practice but, in reality, seeks a review of the judgment of the state court on the basis that the court should have permitted the petitioner to introduce evidence at still a third hearing to

explain the actions of petitioner; actions which were within the very presence of the court itself. At the very most this proceeding in contempt was episodic and unique and the judgment of the Supreme Court of Ohio is not a proper one for review on certiorari. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 99 L. ed. 897, 75 S.Ct. 614 (1954); *United States* v. *Constantine*, 296 U.S. 287, 80 L ed. 233, 56 S.Ct. 223 (1935).

VII

MOTION TO DISMISS

For the foreging reasons and based upon the foregoing authorities, the respondent moves that this petition in the alternative for writ of certiorari be dismissed.

Respectfully submitted,

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